IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAUREEN FLOCCO and JOHN FLOCCO	:	**CIVIL ACTION**
v.	:	
SUPER FRESH MARKETS, INC.	:	**NO. 98-902**

M E M O R A N D U M

WALDMAN, J. **December 29, 1998**

Plaintiffs claim that as a result of defendant's negligence Maureen Flocco was injured when she slipped and fell while shopping at defendant's food market. John Flocco has asserted a companion claim for loss of consortium. Presently before the court is defendant's motion for summary judgment.

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party must come forward with evidence from which a reasonable jury could return a verdict in his favor. See Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

From the evidence of record as uncontroverted or otherwise taken in a light most favorable to plaintiffs, the pertinent facts are as follow.

Plaintiff and their four year old daughter were shopping at defendant's food market at 1500 Packer Avenue in Philadelphia on March 10, 1997. They began in the back of the store and worked their way toward the front. In Mr. Flocco's words, "my kid would pull things off the shelf, I want this, no, put it back, like a four year old would do."

While pushing a shopping cart down an aisle, Maureen Flocco slipped on the contents of a broken jar of turkey gravy and fell on her back. She sustained bruises, contusions and

injury to her knee and back. She did not notice the gravy on the floor before she slipped.

There was no one else in the aisle where Mrs. Flocco fell at the time of the accident. At the time her husband was in the next aisle. Plaintiffs had been shopping in the store for half an hour prior to the accident. During that time neither plaintiff heard the sound of glass breaking. The store pipes in soft music which is played over an intercom. As part of his duties, the store manager walked through the store and inspected the aisles every 15 to 30 minutes.[1] The gravy was still wet at the time Mrs. Flocco slipped. She does not know how or when the jar broke.[2]

The parties agree on the applicable principles of Pennsylvania law. A possessor of land is liable for harm caused to an invitee by a dangerous condition which he or his employees created, or for harm caused by the possessor's failure to protect

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[1] The manager, Fran Zielinski, had worked for defendant continuously since 1961. He had served as a store manager at several locations for eleven years.

[2] Mr. Zielinski testified that Susan Gilligan, a store employee, related to him a conversation she overheard between the plaintiff just after the accident in which Mrs. Flocco told Mr. Flocco that their young daughter had knocked over the jar of turkey gravy. Coming from Ms. Gilligan, this would be competent evidence. See Fed. R. Evid. 801(d)(2)(A). Ms. Gilligan is listed as a defense witness, however, no affidavit or testimony from her has been presented as part of the summary judgment record. Mrs. Flocco's deposition testimony that she does not know how the jar broke was submitted and for purposes of the instant motion the court assumes her testimony is true.

an invitee from a dangerous condition of which he was aware or by the exercise of reasonable care would have discovered. See Carrender v. Fitterer, 469 A.2d 120, 123 (Pa. 1983); Martino v. Great Atlantic & Pacific Tea Co., 213 A.2d 608, 610 (Pa. 1965); Estate of Swift v. Northeastern Hosp. of Phila., 690 A.2d 719, 722 (Pa. Super.), appeal denied, 701 A.2d 577 (Pa. 1997); Moultrey v. Great Atlantic & Pacific Tea Co., 422 A.2d 593, 598 (Pa. Super. 1980). Thus, to recover plaintiffs "must prove either the proprietor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition." Estate of Swift, 690 A.2d at 722.

Constructive notice arises when "the condition existed for such a length of time that in the exercise of reasonable care the owner should have known of it." Moultrey, 422 A.2d at 596. The mere presence of a dangerous condition of a transitory nature is insufficient to impose liability upon the proprietor. See Martino, 213 A.2d at 610 (non-suit appropriate where plaintiffs presented no evidence to show how long grape had been on floor); Estate of Swift, 690 A.2d at 722 (summary judgment appropriate where there was no evidence showing how long water was on floor). See also David by Berkeley v. Pueblo Supermarket, 740 F.2d 230, 234 (3d Cir. 1984) ("even though one proves the presence of a foreign substance at the time of the fall, the mere presence of the foreign substance does not establish whether it had been

there a few seconds, a few minutes, a few hours or even a few days").

Plaintiffs do not contend that they have any evidence that defendant or any of its employees caused the gravy spill or were actually aware of the condition. Rather, they argue that there is circumstantial evidence to show that the gravy was on the floor long enough to charge defendant with constructive notice.

The circumstances on which plaintiffs rely are that Mrs. Flocco saw no one in the aisle at the time of her fall, that the store was quiet and traffic was light that day and that neither plaintiff heard the sound of a jar breaking during the half hour they were in the store shopping. There is no support in the record for two of the four cited circumstances and the other two are simply insufficient reasonably to support a finding of notice or negligence.

The depositions of neither plaintiff contain testimony that the store was quiet or that traffic was light on the day of the accident. The only evidence of record touching on these points is the deposition of the store manager, Fran Zielinski. When asked if he recalled "the amount of customer traffic in the store that day," he testified "No, I don't." When asked if this was generally a busy period, he testified "at times and at time not." Except for Mr. Zielinski's testimony about the practice of

playing music over the intercom, there is no competent evidence regarding how quiet or unquiet the store was at the time.

That plaintiffs did not hear the sound of glass breaking or see another person in the aisle with gravy at the moment of the fall cannot reasonably sustain a finding that the jar must have been broken for at least a half-hour prior to the accident. There is simply no evidence to show from where or how far the jar fell, how much noise a jar full of turkey gravy makes when cracking or that someone engaged in shopping would have heard a gravy jar break in another part of the store.

That Mrs. Flocco did not observe anyone in the aisle when she fell makes it no less likely that another shopper or visitor could have broken the jar shortly before Mrs. Flocco entered the aisle. As noted, the gravy had not dried at the time of the fall.

Plaintiffs suggest that defendant's inspection policy was inadequate because the manager responsible for inspection also had other duties. A supermarket operator has no legal obligation to assign someone full-time to inspect the premises constantly. What the operator must do is exercise reasonable care to discover and correct or warn invitees of any dangerous condition. It is uncontroverted that a store manager with 36 years of supermarket experience routinely inspected each aisle every fifteen to thirty minutes. There is no basis of record to

sustain a finding that this practice was unreasonable. See, e.g., Myers v. Penn Traffic co., 606 A.2d 926, 930 (Pa. Super. 1992) (that no one was watching over area of supermarket where plaintiff fell for twenty minutes does not support inference of negligence).

Plaintiffs have failed to produce competent evidence from which one, without speculation or conjecture, could reasonably find that defendant had actual or constructive notice of the condition in question or failed to exercise reasonable care.

Plaintiffs comment with some exasperation on the difficulty or proving liability "unless there is the good fortune to have a video camera of the accident and the relevant time preceding the accident for review." Proof may sometimes be difficult or impossible. Nevertheless, a store owner is not an insurer of its customers' safety. Moultrey, 422 A.2d at 596. As the Superior Court has observed, "proving negligence in a supermarket slip and fall case is often a heavy burden on a plaintiff even in a meritorious case" and "under some circumstances the difficulties of proof of negligence may be insurmountable." Myers, 606 A.2d at 932 (quoting from DeClerico v. Gimbel Brothers, inc., 50 A.2d 716 (Pa. Super. 1947)). "Nonetheless, in a supermarket slip and fall case it is still incumbent upon the plaintiff to allege sufficient facts and

present sufficient evidence to sustain a cause of action against the store owner." Id. (upholding summary judgment in absence of evidence of how or when produce fell onto floor).

Plaintiffs have not presented sufficient evidence to sustain their claim. Defendant is entitled to summary judgment on the record presented. Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of December, 1998, upon consideration of defendant's Motion for Summary Judgment and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** in the above case for defendant and against plaintiffs.

BY THE COURT:

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JAY C. WALDMAN, J.